FEB 11 1957
JOHN T. FEY, Cle

In the

Supreme Court of the United States

October Term, 1956

No. 764

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA AND T. EDWARD RUTTER, DIVISION SUPERINTENDENT OF SCHOOLS OF THE COUNTY OF ARLINGTON, VIRGINIA

Petitioners

v.

CLARISSA S. THOMPSON, ET AL.,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

FRANK L. BALL
Ball Building
Court House Road
Arlington, Virginia

JAMES H. SIMMONDS
1500 North Court House Road
Arlington, Virginia

Attorneys for Petitioners

J. LINDSAY ALMOND, JR.
Supreme Court Building
Richmond, Virginia
Attorney General of Virginia

HENRY T. WICKHAM
1407 State-Planters Bank Bldg.
Richmond, Virginia
Special Assistant to the Attorney General

TABLE OF CONTENTS

Page

OPINIONS OF COURTS BELOW 2

STATEMENT OF JURISDICTION 2

QUESTIONS PRESENTED 2

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

ARGUMENT 7

I. The Respondents Are Prohibited by the Eleventh Amendment from Maintaining This Action 7

A. This Action Is a Suit Against the State 7

B. The State Has Not Given Its Consent To Be Sued in a Federal Court 10

II. Respondents Have Failed to Prove a Case Upon Which the District Court Could Have Granted Injunctive Relief .. 12

III. The Respondents Have Not Exhausted Their Administrative Remedies 20

CONCLUSION 23

APPENDIX:

I. Opinion of Court of Appeals for Fourth Circuit ..... App. 1

TABLE OF CITATIONS

Cases

Board of Supervisors v. County School Board, 182 Va. 266 (1944) 8

Briggs v. Elliott, 132 F. Supp. 776 17

Brown v. Board of Education of Topeka (May 17, 1954), 347 U. S. 483, and (May 31, 1955) 349 U. S. 294 12

Page

Carson v. Board of Education of McDowell County, 227 F. (2d) 789 (4th Cir., 1955) 20

Duhne v. New Jersey, 251 U. S. 311 (1920) 7

Ex Parte New York, 256 U. S. 490 (1921) 7

Ex Parte Young, 209 U. S. 123 (1908) 7

Fitts v. McGhee, 172 U. S. 516 (1899) 7

Ford Motor Co. v. Department of Treasury, 323 U. S. 459 (1945) 11

Georgia R. R. & Banking Co. v. Redwine, 342 U. S. 300 (1952) 8

Great Northern Life Ins. Co. v. Read, 322 U. S. 47 (1944) 10

Hans v. Louisiana, 134 U. S. 1 (1890) 7

Hood v. Board of Trustees, 232 F. (2d) 626 (4th Cir., 1956) 22

Kennecott Copper Corporation v. State Tax Comm'r., 327 U. S. 573 (1946) 11

Maia v. Eastern State Hospital, 97 Va. 507 (1899) 12

Missouri v. Fiske, 290 U. S. 18 (1933) 9

O'Neill v. Early, 208 F. (2d) 286 (4th Cir., 1953) 8

Osborn v. Bank of United States, 9 Wheat. 738 7

Sterling v. Constantin, 287 U. S. 378 (1932) 8

Other Authorities

Code of Virginia (1950):

Section 22-63 3

Section 22-57 3

In the

Supreme Court of the United States

October Term, 1956

No. .....

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA AND T. EDWARD RUTTER, DIVISION SUPERINTENDENT OF SCHOOLS OF THE COUNTY OF ARLINGTON, VIRGINIA

Petitioners

v.

CLARISSA S. THOMPSON, ET AL.,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, the County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools of the County of Arlington, Virginia, respectfully pray that a writ of *certiorari* be issued out of and under the seal of the Court to review the decision of the United States Court of Appeals for the Fourth Circuit hereinafter set forth and represent as follows:

OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals was rendered on December 31, 1956, and is printed as Appendix I to this petition.

The memorandum of the District Court for the Eastern District of Virginia, Alexandria Division was rendered on July 31, 1956, and is printed as Appendix IV of "Brief and Appendix on Behalf of Appellants," which is made a part of the record in this case in accordance with paragraph 4 of Rule 21 of this Court. In accordance with Rule 23, paragraph 1(i) of this Court, it is not reprinted here.

STATEMENT OF JURISDICTION

The final decree of the district court was entered on July 31, 1956, a copy of which is found as Appendix III of "Brief and Appendix on Behalf of Appellants," and the Court of Appeals affirmed said decree on December 31, 1956.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (June 25, 1948, C. 646, 62 Stat. 928).

THE QUESTIONS PRESENTED

Point I

May a federal district court enjoin a local school board, which is admittedly an agency of the Commonwealth of Virginia, and a State officer in his official capacity when the Commonwealth has not given its consent to be sued?

Point II

Is there any case or controversy presented by this action over which a federal district court has jurisdiction?

Point III

Have the respondents exhausted their administrative remedies so as to entitle them to relief in a federal district court?

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eleventh Amendment to the Constitution of the United States reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Section 22-63, Code of Virginia (1950), Vol. 5, p. 16, reads as follows:

> "§ 22-63. School board constitutes body corporate; powers generally.—The members so appointed shall constitute the county school board, and every such board is declared a body corporate, under the style of the County School Board of ..... County, and may, in its corporate capacity, sue or be sued, contract, or be contracted with and, in general, is vested with all the powers, and charged with all the duties, obligations and responsibilities imposed upon such board as such by law."

Section 22-57, Code of Virginia (1950), Vol. 5, pp. 14-15 reads as follows:

> "Any five interested heads of families, residents of the county, or city, who may feel themselves aggrieved by the action of the county or city school board, may,

within thirty days after such action, state their complaint, in writing, to the division superintendent of schools who, if he cannot within ten days after the receipt of the complaint, satisfactorily adjust the same, shall, within five days thereafter, at the request of any party in interest, grant an appeal to the circuit court of the county or corporation court of the city or the judge thereof in vacation who shall decide finally all questions at issue, but the action of the school board on questions of discretion shall be final unless the board has exceeded its authority or has acted corruptly. The proceedings on such an appeal shall be informal, and no pleading shall be required, other than the complaint hereinabove provided for. A copy of the order shall also be entered by the clerk of the board in the minute book of the county or city board.

"When a school is owned or operated jointly by two or more counties, all questions arising with reference to the school, shall be voted on by the county school boards of the counties jointly, and the majority vote of the combined boards shall be final, unless appealed from as provided in this section. In the event of an appeal from the joint action of such boards, the complaint shall be made to the division superintendents of both counties affected, and if they cannot adjust the same as provided in this section, an appeal shall be allowed to the circuit court of the county or the corporation court of the city or the judge thereof in vacation."

STATEMENT OF THE CASE

This cause was heard by the District Court on July 30, 1956, upon the bill of complaint filed by the respondents on May 17, 1956, and upon the petitioners' motion to dismiss and the affidavits in support thereof. The jurisdiction of the District Court was invoked pursuant to Title 28, United States Code, Section 1343. The respondents, both Negro and white school children, prayed for a preliminary and

permanent injunction restraining and enjoining the petitioners from enforcing and pursuing against them and others similarly situated, the policy and practice of segregating, on the basis of race or color, the children attending the public schools of Arlington County.

The petitioners moved to dismiss the complaint on the grounds, among others, that this action was, in fact, a suit against the Commonwealth of Virginia in violation of the Eleventh Amendment to the Constitution of the United States and that the respondents had not exhausted their administrative remedies.

By order dated July 31, 1956, the district court denied the petitioners' motion to dismiss, treating it as a motion for summary judgment, and restrained the petitioners from refusing on account of race or color to admit any child to any public school under their jurisdiction.

The injunction granted by the court below was made effective on January 31, 1957, as to admissions to elementary schools, and with respect to junior and senior high schools, it was made effective at the commencement of the regular session for 1957-1958 in September, 1957.

An appeal was duly noted and the Court of Appeals heard argument on November 27, 1956. Its decision was rendered on December 31, 1956.

The respondents brought this action against petitioner T. Edward Rutter in his official capacity as a constitutional officer of the Commonwealth of Virginia and have conceded in their complaint that the school board is an agency of the Commonwealth of Virginia.

The complaint alleged that a formal demand had been made that the petitioners conform to the school segregation decisions of this Court and desist from the policy, practice and custom of denying Negro children admission to white

schools and white children admission to Negro schools because of their race or color.

The only material evidence was certain correspondence between counsel for the respondents and the petitioners. The first was a petition signed by the respondents calling upon the petitioners to reorganize the public schools of Arlington County so that the children of school age would not be denied admission to any school solely because of race or color. The petition also pointed out that the petitioners were "duty bound to take immediate concrete steps leading to an early elimination of segregation in the public schools."

The next evidence introduced in the district court was a statement issued by the school board on July 28, 1955, to the effect that no classes would be integrated in September, 1955, but that alternate plans for the orderly implementaion of this Court's decisions were being studied.

On January 14, 1956, the school board issued another statement in which it was said that the Arlington County public schools would comply with any action taken by the State Legislature and that there would be some integration in the elementary and high schools in the fall of 1956 if the recommendations of the so-called Gray Commission were enacted into law.

An attorney for the respondents addressed a letter to petitioner Rutter on April 12, 1956, stating that he did not feel that Arlington County's plans for integration fully met the request of the previous petition or conformed in all respects to the recent decisions of this Court. Superintendent Rutter was then asked when the Arlington County school authorities would discontinue the policy of racial segregation in the public schools. Rutter replied by stating that he had been directed to refer the letter to the proper State authorities.

ARGUMENT

I.

The Respondents Are Prohibited by the Eleventh Amendment from Maintaining This Action

The Eleventh Amendment to the Constitution of the United States reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Although the Eleventh Amendment only expressly covers suits by citizens of another state or citizens or subjects of a foreign state, it has been interpreted as prohibiting suits against a state by its own citizens. *Hans* v. *Louisiana,* 134 U. S. 1 (1890); *Fitts* v. *McGhee,* 172 U. S. 516 (1899); *Duhne* v. *New Jersey,* 251 U. S. 311 (1920); *Ex parte New York,* 256 U. S. 490 (1921).

A.

This Action is a Suit Against the State

As early as 1824 this Court in *Osborn* v. *Bank of United States,* 9 Wheat. 738, held that a state official possesses no official capacity when acting illegally and hence can derive no protection from an unconstitutional state statute.

In the case of *Ex parte Young,* 209 U. S. 123 (1908), the Attorney General of Minnesota had been found guilty of contempt of a federal court in that he had refused to dismiss mandamus proceedings brought to compel compliance with a state statute governing the rates of certain railroads. This

Court held that the action in the federal court was not a suit against the state in that it sought only to enjoin a state officer from enforcing an unconstitutional statute.

In *Georgia R. R. & Banking Co.* v. *Redwine*, 342 U. S. 300, 304 (1952), a case to enjoin a state officer of Georgia from enforcing an allegedly unconstitutional tax, the late Chief Justice Vinson, speaking for the Court, said:

> "* * * This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State. These decisions were reexamined and reaffirmed in *Ex Parte Young*, 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441, 13 L. R. A. NS 932, 14 Ann. Cas. 764 (1908), and have been consistently followed to the present day. * * *"

For the purposes of this argument, the petitioners accept the principles enunciated in the foregoing cases, namely, that when there is a showing that the exertion of state power overrides rights secured by the Constitution, an appropriate proceeding may be brought ***against the individuals charged with the transgression.*** See, *Sterling* v. *Constantin*, 287 U. S. 378, 397 (1932).

However, the instant case has been brought against a local school board which is concededly an agency of the Commonwealth of Virginia. The action of the petitioners is the action of the state, since local school boards and division superintendents are the means through which the state performs its function of maintaining a public school system. See, *Board of Supervisors* v. *County School Board*, 182 Va. 266 (1944) and *O'Neill* v. *Early*, 208 F. (2d) 286 (4th Cir., 1953).

Accordingly, the respondents, in absence of state consent, cannot maintain this action because of the prohibitions of the Eleventh Amendment. It has been urged, however, that

if such be the holding of the Court, the respondents would be unable to enforce rights secured by the Constitution. This, of course, is not true, since it is conceded that the respondents may, in an appropriate proceeding, sue individuals who may be charged with violating their rights under color of an unconstitutional statute.

It has also been suggested that the school board is suable because if acting as charged in the complaint, it is not acting as an agency of the state. A state may act only through its officers and agencies. Therefore, an agency of the state is the state itself. The question immediately arises, then, as to when is a state not a state. If it be held that a state is not a state when it acts in an unconstitutional manner, the prohibitions contained in the Eleventh Amendment would be drastically limited, contrary to their plain meaning, and to the decisions rendered thereunder.

The proper interpretation of the Eleventh Amendment, in so far as its applicability to particular types of suits, is found in the following language of *Missouri* v. *Fiske*, 290 U. S. 18, 25-27 (1933):

> "The Eleventh Amendment is an explicit limitation of the judicial power of the United States. . . . However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.' *Ex parte New York*, 256 U. S. 490, 497. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States. *Hans* v. *Louisiana*, 134 U. S. 1, 10; *Palmer* v. *Ohio*, 248 U. S. 32, 34; *Duhne* v. *New Jersey*, 251 U. S. 311, 313, 314."
>
> ". . . Expressly applying to suits in equity as well as

> at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State. This conception of the Amendment has had abundant illustration. *Louisiana* v. *Jumel*, 107 U. S. 711, 720; *Hagood* v. *Southern*, 117 U. S. 52, 67; *In re Ayers*, 123 U. S. 443, 497; *Fitts* v. *McGhee*, 172 U. S. 516, 529."

Therefore, it must be concluded that the Eleventh Amendment prohibits a suit against a state whether the nature of the suit involves interest in property or civil rights of individuals.

In conclusion, the petitioners repeat that they do not contend that the Eleventh Amendment prohibits a suit against individual members of a local school board or against a division superintendent as an individual acting under an unconstitutional statute. Individuals have not been named in the instant case nor have they been served with process. This action is a suit against the state in name and in fact, and as such, should be dismissed, unless it can be successfully contended that the state has consented to be sued.

B.

The State Has Not Given Its Consent To Be Sued in a Federal Court

The school board is created by statute as a body corporate, and among its enumerated powers is the power to sue and be sued. Section 22-94, Code of Virginia (1950). The question to be decided is whether or not the section applies only to suits in state courts. Three decisions of this Court hold that consent to suit in the federal courts will not be implied, but must be expressly stated by statute.

In *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47

(1944), a foreign insurance company brought suit in a federal district court to recover the tax paid under protest on premiums written in the state. Although the statutory provision for appeal of such taxes provided that "all such suits shall be brought in the court having jurisdiction thereof," this Court held that the clear implication of the statute as a whole was that the state consented only to suit in its own courts. The Court stated at page 54:

> ". . . When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts. Federal courts, sitting within states, are for many purposes courts of that state, *Madisonville Traction Co.* v. *St. Bernard Min. Co.*, 196 U. S. 239, 255, 49 L. Ed. 462, 468, 25 S. Ct. 251, but when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

In *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459 (1945), this Court reaffirmed its position in the *Read* case under similar facts. Although the state statute authorized action in "any court of competent jurisdiction," this Court, on considering the whole statute, failed to find the requisite clear indication of consent to suit in a federal court.

The case of *Kennecott Copper Corp.* v. *State Tax Comm'r*, 327 U. S. 573 (1946), again illustrates the position taken by the Court on this question. There, the applicable state statute also provided only that one "may bring an action in any court of competent jurisdiction." This Court never-

theless held that the suit could not be brought in a federal court and concluded at pages 579-580:

> "We conclude that the Utah statutes fall short of the clear declaration by a state of its consent to be sued in the federal courts which we think is required before federal courts should undertake adjudication of the claims of taxpayers against a state."

The Court of Appeals for the Fourth Circuit has also concluded that the statute now under consideration does not authorize a suit against a local school board in a federal court. In *O'Neill* v. *Early, supra,* at page 288, Chief Judge Parker, speaking for the Court, said:

> "The fact that the state has authorized the defendant school board to sue and be sued is immaterial, since it has not consented to suit in the federal court. * * *"

Compare, *Maia* v. *Eastern State Hospital,* 97 Va. 507 (1899), wherein it was held by the Supreme Court of Appeals of Virginia that simply because a public corporation was authorized by statute to sue and be sued, it did not follow that it could be sued in all cases in which a private corporation may be sued.

It must be concluded, therefore, that since this action is a suit against the state for which consent has not been given, it must be dismissed as violating the Eleventh Amendment.

II.

Respondents Have Failed to Prove a Case Upon Which the District Court Could Have Granted Injunctive Relief

This court is now asked to consider one of its first cases against a school board which was not a party in *Brown* v. *Board of Education of Topeka* (May 17, 1954), 347 U. S.

483, and (May 31, 1955) 349 U. S. 294. Therefore, it is to be assumed that the decision in this case must create the original and fundamental precedents relating not only to procedural requirements in federal district courts but relating also to the requirements of proving whatever specific facts as are necessary, as a matter of substantive law, to support the specific relief thought to be afforded by the doctrine of the *Brown* case. Hence, it is felt with good reason that the point presented here is of great importance both to the final determination of this case and to the subsequent consideration of similar cases by other district courts.

To present the point clearly it is necessary to show the theory upon which the respondents proceeded in the district court. Some idea of that theory can be gathered from the so-called "petition" sent to the local school board by NAACP attorneys purporting to represent a certain group of Negroes. This "petition" merely called the school board's attention to the decision in the *Brown* case, construed it to require the early elimination of segregation in the public schools and demanded that immediate steps be taken "to reorganize the public schools under your jurisdiction so that children may attend them without regard to their race or color." Subsequently, the same attorneys, purporting to represent substantially the same persons as listed in the "petition" filed their complaint alleging, among other things, that the petitioners maintain and operate separate public schools for Negro and white children, respectively, and deny the infant respondents, because of their race and color, admission to and education in public schools operated for white children, pursuant to a policy, practice, custom and usage of segregating, on the basis of race or color, all the children attending the public schools; and further that the petitioners will continue to pursue against the respondents,

and all other children similarly situated, the same policy, practice, custom and usage unless restrained and enjoined from so doing.

The petitioners assert that even assuming this properly to be a class action, the only persons coming within said class are citizens of the United States residing in the Commonwealth of Virginia who are otherwise duly qualified for admission to the public schools, and who have applied for and been denied such admission.

The only issue then, squarely presented by the pleadings, amounts to this: Is the local school board specifically denying any one of the respondents the right, which he or she should properly have, to attend a particular school?

Whatever the policy, practice, custom and usage may be, they are not directly relevant to the issues in this case. If they result in segregation in the public schools *solely because of race and not because of any other factors* it is assumed that they must be abandoned under the doctrine of the *Brown* case. But, and this is the important point, neither in the *Brown* case, nor in any of its companion cases, did any court decide that any particular Negro child, or particular group of Negro children under the jurisdiction of the petitioners were being denied the rights now guaranteed to them. In short, it would seem obvious, that it is no longer necessary for a district court to reaffirm the doctrine of the *Brown* case but it is necessary, and we would think mandatory, in the interests of fairness and orderly procedure, for the district court to apply the doctrine of the *Brown* case to the facts presented, and to decide specifically whether any respondent has carried the burden of showing that he or she is being unlawfully denied admission to a particular school.

In the instant case, the district court merely reaffirmed the doctrine of the *Brown* case and ordered the petitioners to cease the practice of segregation commencing on a specified

date. It is admitted, of course, that in any suit seeking injunctive relief the trial court may fix a time from which the injunction is to operate, if granted. But it also must be assumed that the basic requirements of civil procedure demand that each respondent prove both a specific right and the denial of that right before he or she obtains a decree enjoining the denial of the right.

The position here taken suggests no more than an adherance to basic and well-established principles of civil procedure and it is thoroughly consistent with that part of the implementing decision in the *Brown case* (349 U. S. 294) which had the effect of remanding the cases then pending to the respective district courts for final determination in accordance with the principal decision. This Court was careful to make these provisions for the guidance of the trial courts to which the cases were being remanded, saying at pages 299-300:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.
>
> "In fashioning and effectuating the decrees the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of

equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

It must be remembered that although this Court had established a general constitutional doctrine applicable to all

jurisdictions, procedurally its decisions were directed to the parties in the cases before it. Previously, each case had been tried in its respective trial court; abundant evidence had been taken in each case and presumably the plaintiffs had successfully carried the burden of proving by sufficient facts, a right to enter a white school and a denial of that right. Therefore, this Court, having reached its decision, only had to direct the respective trial courts to carry out the mandate, taking into account the various considerations hereinabove quoted.

Now let us examine the evidence produced in the instant case and inquire whether any one of these respondents has proved a specific right, and that he or she is being denied that right. Obviously, the only specific right which could be proved in this case is the right to transfer from one public school to another. It was suggested in *Briggs* v. *Elliott*, 132 F. Supp. 776, that the right of any qualified individual, regardless of race, to attend any public school of his choice was not necessarily a general right permitting every Negro child to attend a heretofore all-white public school. The clear language of the decision affords no different interpretation for, speaking of this Court's decision, the three-judge district court stated at page 777:

> "* * * It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that the state may not deny any person on account of race the right to attend any school that it maintains. * * * The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segre-

> gation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. * * *"

Specifically, the right exists and must be recognized when an individual Negro child shows that he is fully qualified and desires to attend a particular school. He must show his qualification and right to transfer from one school to another by making known the particular school he seeks to attend; by showing that both the school and his residence are so located geographically as to make his attendance there practicable; by showing that the physical facilities in the particular school will accommodate him; and by showing that he is at least as well suited to attend as those already in attendance. These factors should be easy to prove in any particular case, if they exist, but upon the failure to prove them, there could be no finding of specific discrimination on the basis of race, and such a finding is essential to the relief here sought. Therefore, to complete the requirement, it would appear that any plaintiff or group of plaintiffs, having affirmatively established the right to be admitted to or to transfer to another school, must prove the denial of that right, solely because of race.

We believe these conclusions to be logical, well supported by the authorities and eminently sound. If they be, then what have the respondents proved in the instant case? Only these facts: that they are Negroes, living within the jurisdiction of the school board; that the infants of the class attend and are entitled to attend public schools; that the school board operates elementary and high schools, heretofore attended by white students, and elementary and high schools heretofore attended by Negro students; and that apparently no change in the program was contemplated as of the date of the trial below. Not one of them has attempted

to show that he is as well situated to attend another school as the one he is now attending. There is no evidence in this record giving the exact location of the various schools or of the residence of the respondents, or a description of the public school transportation facilities now available, or the ages and grade levels of the respondents, or the present enrollment and maximum capacities of the various schools, or the identity of the school into which they may wish to be transferred. None of them have even applied for admission in another school, and as far as the record will disclose they may all voluntarily choose to stay in the schools they are now attending. The fact that opposing counsel, openly and obviously representing the NAACP through the individuals here named as respondents, may contend otherwise makes no difference because not one of these respondents has testified that he seeks or will seek admission to another school.

It is therefore perfectly clear that, unless all of the underlying principles of civil procedure are disregarded, the conclusion is inescapable that not one of these respondents are entitled to any specific relief for the simple reason that they have thoroughly and completely failed to carry the burden of proof.

In conclusion, it is respectively submitted that the order of the District Court can leave these respondents in no different posture than that in which they found themselves immediately after this Court decision in the *Brown* case. If any of them should claim an abridgment of the right to transfer from one school to another, the *Brown* case will supply the trial court with the constitutional principle which must be applied. However, relief in the very nature of the case must be specific and accorded only after affirmative proof of the essential facts and circumstances giving rise to an individual right and the denial of that right on account of race.

III.

The Respondents Have Not Exhausted Their Administrative Remedies

As already pointed out, the respondents have not applied for admission to any particular school. They have made only general requests that the school system be reorganized. Thus, in fact, the respondents have not even resorted to their administrative remedies, though the law requires that they be exhausted before seeking injunctive relief.

Section 22-57 of the Code of Virginia (1950) provides for appeals from the actions of school boards. The respondents have alleged in their complaint that they have no remedy other than injunctive relief. The plain language of Section 22-57 is thus ignored. This is a class action. Therefore, all of the respondents, or any five of them, who may have felt themselves aggrieved by any action of the school board, could have appealed such action to the division superintendent of schools. If their complaint was not then adjusted, any one of them would have the right to appeal to a court of record. Such an appeal would require no further pleading and the court would not be bound by any illegal action of the local school board, or the division superintendent.

The case of *Carson* v. *Board of Education of McDowell County*, 227 F. (2d) 789 (4th Cir., 1955), wherein it was held that federal courts would not intervene until state administrative remedies had been exhausted is pertinent. The complaint in that case was filed before this Court's decision in the school segregation cases and the plaintiffs requested, among other things, equal educational facilities for Negro children. The district court dismissed the action on the ground that the decisions of this Court had made inappropriate the relief prayed for in the complaint. How-

ever, the Court of Appeals vacated the order on the ground that the plaintiffs were entitled to a declaratory judgment of their right to attend school without discrimination and remanded the case to the district court. The district court was directed to consider state administrative remedies for persons aggrieved by actions of local school boards.

The language in the *Carson* case is applicable to the instant case. Accordingly, it is quoted fully, beginning at page 790, as follows:

> "In further consideration of the case, however, the District Judge should give consideration not merely to the decision of the Supreme Court but also to subsequent legislation of the State of North Carolina providing an administrative remedy for persons who feel aggrieved with respect to their enrollment in the public schools of the state. The Act of March 30, 1955, entitled 'An Act to Provide for the Enrollment of Pupils in Public Schools,' being chapter 366 of the Public Laws of North Carolina of the Session of 1955, provides for enrollment by the county and city boards of education of school children applying for admission to schools, and authorizes the boards to adopt rules and regulations with regard thereto. It further provides for application to and prompt hearing by the board in the case of any child whose admission to any public school within the county or city administrative unit has been denied, with right of appeal therefrom to the Superior Court of the county and thence to the Supreme Court of the state. An administrative remedy is thus provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted. *Meyers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, 58 S. Ct. 459, 82 L. Ed. 638; *Natural Gas Pipeline Co. of America* v. *Slattery*, 302 U. S. 300, 310, 311, 58

S. Ct. 199, 82 L. Ed. 276; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 172, 55 S. Ct. 7, 79 L. Ed. 259; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463, 54 S. Ct. 471, 78 L. Ed. 909; *P. F. Petersen Baking Co.* v. *Bryan*, 290 U. S. 570, 575, 54 S. Ct. 277, 78 L. Ed. 505; *Porter* v. *Investors' Syndicate*, 286 U. S. 461, 52 S. Ct. 617, 76 L. Ed. 1226; *Matthews* v. *Rodgers*, 284 U. S. 521, 525-526, 52 S. Ct. 217, 76 L. Ed. 447; *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150.

"This rule is especially applicable to a case such as this, where injunction is asked against state or county officers with respect to the control of schools maintained and supported by the state. The federal courts manifestly cannot operate the schools. All that they have the power to do in the premises is to enjoin violation of constitutional rights in the operation of schools by state authorities. Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary. As said by Mr. Justice Stone in *Matthews* v. *Rodgers, supra* (284 U. S. 525): 'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' Interference by injunction with the schools of a state is as grave a matter as interfering with its fiscal operations and should not be resorted to 'where the asserted federal right may be preserved without it.'"

The more recent case of *Hood* v. *Board of Trustees*, 232 F. (2d) 626 (4th Cir., 1956), reaffirmed the principle enunciated in the *Carson* case in the following language:

"This is an appeal from the denial of a motion for summary judgment in an action by school children for an injunction to prevent discrimination on the ground of race. As the denial of motion for summary judgment is not a final judgment in the case, we can entertain the appeal only by considering the denial of the motion as a denial of injunctive relief. So considered, the order denying such relief must be affirmed, as the administrative remedies prescribed by the recent South Carolina statute[1] have not been exhausted. *Carson* v. *Board of Education of McDowell County*, 4 Cir., 227 F. 2d 789. As plaintiffs were not entitled to injunctive relief for this reason, we affirm the order in so far as it denies an injunction, without passing upon other questions raised in the case or approving the reasoning of the court below in denying the motion for summary judgment."

Since the respondents have merely filed a "formal" petition demanding the reorganization of the school system in light of the school segregation decisions, it is perfectly obvious that they have not exhausted their state administrative remedies. The respondents may feel aggrieved by the action of the local school board, or many, or all of them, may have no legal or justifiable grounds for feeling aggrieved. It is, therefore, submitted that the instant case should have been remanded to the District Court with directions that the complaint be dismissed.

CONCLUSION

It is respectfully submitted that the Court below has decided important questions under the Constitution of the United States and under the decisions of this Court in the

[1] An Act to amend sections 21-103 and 21-46 of the Code of Laws of South Carolina, 1952, Approved March 8, 1956.

school segregation cases which have not been, but should be, settled by this Court.

Respectfully submitted,

J. LINDSAY ALMOND, JR.
Supreme Court Building
Richmond, Virginia
Attorney General of Virginia

HENRY T. WICKHAM
1407 State-Planters Bank Bldg.
Richmond, Virginia
Special Assistant to the Attorney General

FRANK L. BALL
Ball Building
Court House Road
Arlington, Virginia

JAMES H. SIMMONDS
1500 North Court House Road
Arlington, Virginia

Attorneys for Petitioners

February 8, 1957.

DARK PAGE BLEED THRU

CERTIFICATE OF SERVICE

I Hereby Certify that copies of the aforegoing petition have been served by mailing the same, with first class postage prepaid, to the following counsel of record:

Edwin C. Brown
1200 Cameron Street
Alexandria, Virginia

Spottswood W. Robinson, III
623 North Third Street
Richmond, Virginia

Oliver W. Hill
118 East Leigh Street
Richmond, Virginia

on this 8th day of February, 1957.

.....

HENRY T. WICKHAM

Appendix I

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7303.

The School Board of the City of Charlottesville, and Fendall R. Ellis, Division Superintendent of Schools of the City of Charlottesville, Virginia,
Appellants,

versus

Doris Marie Allen, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT CHARLOTTESVILLE.

No. 7310.

County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools, Arlington County, Virginia,
Appellants,

versus

Clarissa S. Thompson, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.

DARK PAGE BLEED THRU

(Argued November 27, 1956. Decided December 31, 1956.)

Before PARKER, Chief Judge, and SOPER and SOBELOFF, Circuit Judges.

John S. Battle (John S. Battle, Jr., and Henry T. Wickham, Special Assistant to the Attorney General of Virginia, on brief) for Appellants in No. 7303; Frank L. Ball (James H. Simmonds, and Henry T. Wickham, Special Assistant to the Attorney General of Virginia, on brief) for Appellants in No. 7310; J. Lindsay Almond, Jr., Attorney General of Virginia, for Appellants in both cases; Oliver W. Hill and Spottswood W. Robinson, III, for Appellees in both cases (Martin A. Martin, Roland D. Ealey, and S. W. Tucker on brief for Appellees in No. 7303, and Edwin C. Brown on brief for Appellees in No. 7310).

PARKER, Chief Judge:

These are appeals in actions instituted in behalf of Negro school children to enjoin School Boards and Division Superintendents of Schools from enforcing racial segregation. One action relates to the schools of the City of Charlottesville, Virginia, and the other to the schools of the County of Arlington in that state. Injunctions were granted in both cases and the school authorities have appealed, raising practically the same questions. The questions presented by the appeals are: (1) whether the actions should have been dismissed as suits against the state, (2) whether plaintiffs had failed to exhaust administrative remedies, and (3) whether there was abuse of discretion in entering the injunctive orders.

With respect to the Charlottesville case, it appeared on a hearing duly held that request had been made to the school authorities to take action toward abolishing the requirement of segregation in the schools and that no action had been taken. The District Judge in his opinion, after reciting the pertinent evidence, summarized his conclusions as follows:

> "The prayer of the complaint is in substance that the defendants be enjoined from continuing to maintain segregated schools. The defendants have refused to agree to abandon the practice of segregation and have made it plain that they intend, if possible, to continue it. Under this state of facts the plaintiffs are undoubtedly entitled to maintain this action and to have the relief prayed for.
>
> "It only remains to be determined as to the time when an injunction restraining defendants from maintaining segregated schools shall become effective. The original decision of the Supreme Court was over two years ago. Its supplementary opinion directing that a prompt and reasonable start be made toward desegregation was handed down fourteen months ago. Defendants admit that they have taken no steps toward compliance with the ruling of the Supreme Court. They have not requested that the effective date of any action taken by this court be deferred to some future time or some future school year. They have not asked for any extension of time within which to embark on a program of desegregation. On the contrary the defense has been one of seeking to avoid any integration of the schools in either the near or distant future. They have given no evidence of any willingness to comply with the ruling of the Supreme Court at any time. In view of all these circumstances it is not seen where any good can be accomplished by deferring the effective date of the court's decree beyond the beginning of the school session open-

ing this Autumn. Even though the time be limited it is not impossible that, at the school session opening in September of this year, a reasonable start be made toward complying with the decision of the Supreme Court."

The order, which by its terms was to become effective at the commencement of the school term beginning in September 1956, and which retained jurisdiction of the cause for such future action as might be necessary, restrained and enjoined the defendants:

> "From any and all action that regulates or affects, on the basis of race or color, the admission, enrollment or education of the infant plaintiffs, or any other Negro child similarly situated, to and in any public school operated by the defendants."

The Arlington case was heard upon the pleadings and upon documentary evidence submitted to the court on a motion to dismiss. The judge found from the documentary evidence and from the statements of counsel in open court that there was no genuine issue as to any material fact in the case and that "on the admissions of record and the uncontrovertible allegations of the complaint, summary judgment should be granted the plaintiffs". With respect to exhaustion of administrative remedies he made the following finding:

> "(d) That, as appeared from the said documentary evidence, the plaintiffs before instituting this suit had exhausted all administrative remedies then and now available to them, including the administrative steps set forth in Section 26-57 Code of Virginia 1950, in that, they have since July 28, 1955, in effect maintained a continuing request upon the defendants, the

County School Board and the Division Superintendent of Schools, for admission of Negro children to the public schools of Arlington County on a non-racial basis, and said request has been denied, or no action taken thereon, the equivalent of a denial thereof."

The decree, which was made effective with respect to elementary schools at the beginning of the second semester of the 1956-1957 session and with respect to high schools at the commencement of the 1957-1958 session, restrained and enjoined the defendants "from refusing on account of race or color to admit to, or enroll or educate in, any school under their operation, control, direction, or supervision any child otherwise qualified for admission to, and enrollment and education in, such school."

The foregoing general language of the decree was limited by paragraph 4 thereof, which made clear that the court was not attempting to direct how the school board should handle the problem of assigning pupils but was merely forbidding unconstitutional discrimination on the ground of race or color. That paragraph is as follows:

"4. The foregoing injunction shall not be construed as nullifying any State or local rules, now in force or hereafter promulgated, for the assignment of children to classes, courses of study, or schools, so long as such rules or assignments are not based upon race or color; nor, in the event of a complaint hereafter made by a child as to any such rule or assignment, shall said injunction be construed as relieving such child of the duty of first fully pursuing any administrative remedy now or hereafter provided by the defendants or by the Commonwealth of Virginia for the hearing and decision of such complaint, before applying to this court for a decision on whether any such rule or assignment violates said injunction."

In his memorandum filed at the time of the entry of the decree, the judge said:

> "It must be remembered that the decisions of the Supreme Court of the United States in *Brown* v. *Board of Education*, 1954 and 1955, 347 U. S. 483 and 349 U. S. 294, do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of the Court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate."

We see nothing in these decrees of which the defendants can complain. The decrees do not attempt to direct the school officials as to how they shall perform their duties or exercise the discretion vested in them by law, but simply forbid them to discriminate against the plaintiffs, or other Negro children similarly situated, on the ground of race or color, in violation of their rights under the Constitution of the United States as declared by the Supreme Court. A suit for such relief is not a suit against a state within the meaning of the 11th Amendment to the Constitution, but is a suit for the protection of individual rights under the Constitution by enjoining state officers and agencies from taking action beyond the scope of their legal powers. The difference between using the injunctive power of the court to direct the exercise of discretion by a state officer and using it to enjoin the violation by him of Constitutional rights under the

authority of his office was pointed out nearly a half a century ago in *Ex Parte Young*, 209 U. S. 123, 159-160, where the court said:

> "It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the State of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.
>
> "The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

See also *Lane* v. *Watts*, 234 U. S. 525, 540; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Colorado* v. *Toll*, 268 U. S. 228, 230; *Ferris* v. *Wilbur*, 27 F. 2d 262; *Appalachian Electric Power Co.* v. *Smith*, 4 Cir., 67 F. 2d 451, 454.

It is argued that the doctrine thus laid down must be con-

fined to individuals and may not be applied to corporate agencies of the state such as school boards. We see no ground for such a distinction. If high officials of the state and of the federal government (see *Philadelphia Co.* v. *Stimson*, supra) may be restrained and enjoined from unconstitutional action, we see no reason why a school board should be exempt from such suit merely because it has been given corporate powers. A state can act only through agents; and whether the agent be an individual officer or a corporate agency, it ceases to represent the state when it attempts to use state power in violation of the Constitution and may be enjoined from such unconstitutional action. While no such question was raised in the cases heard by the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483 and 349 U. S. 294, the question was inherent in the record in those cases; and it is not reasonable to suppose that the Supreme Court would have directed injunctive relief against school boards acting as state agencies, if no such relief could be granted because of the provisions of the Eleventh Amendment to the Constitution.

There is nothing to the contrary in the decision of this court in *O'Neill* v. *Early*, 4 Cir., 208 F. 2d 286, which was a suit against a state agency to establish a liability payable out of public funds controlled by the agency in its supervision of the state's educational system. We quoted from the decision of the Supreme Court, speaking through Mr. Justice Reed in *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47: "Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution." This is, of course, a very different thing from enjoining a state officer or state agency from taking action violative of the Constitution.

We think that the court was clearly right with respect to exhaustion of administrative remedies. The pupil placement law recently enacted by the General Assembly had not become effective and, in so far as Section 22-27 of the Code of Virginia is concerned, that only provided for petition to a school board by joint action of five heads of families who felt themselves aggrieved by action of the board. If it could be held applicable to the plaintiffs here, its provisions were satisfied by the applications made to the boards without result in both cases here before us by counsel acting in behalf of plaintiffs. Defendants argue, in this connection, that plaintiffs have not shown themselves entitled to injunctive relief because they have not individually applied for admission to any particular school and been denied admission. The answer is that in view of the announced policy of the respective school boards any such application to a school other than a segregated school maintained for Colored people would have been futile; and equity does not require the doing of a vain thing as a condition of relief. Reliance is placed upon our decision in *Carson* v. *Warlick*, 4 Cir., ... F. 2d ..... In that case, however, an adequate administrative remedy had been prescribed by statute, the plaintiffs there had failed to pursue the remedy as outlined in the decision of the Supreme Court of the State and there was nothing upon which a court could say that if they had followed such remedy their rights under the Constitution would have been denied them.

There is no basis for the contention that either of the judges below abused his discretion in granting the injunction. It had been two years since the first decision of the Supreme Court in *Brown* v. *Board of Education* and, despite repeated demands upon them, the boards of education had taken no steps towards removing the requirement of segregation in the schools which the Supreme Court had held

violative of the constitutional rights of the plaintiffs. This was not "deliberate speed" in complying with the law as laid down by the Supreme Court but was clear manifestation of an attitude of intransigence, which justified the issuance of the injunctions to dispel the misapprehension of school authorities as to their obligations under the law and to bring about their prompt compliance with constitutional requirements as interpreted by the Supreme Court. Very much in point is the decision of the Court of Appeals of the Fifth Circuit in *Jackson* v. *Rawdon*, 5 Cir., 235 F. 2d 93, cert. den. ..... U. S. ....., which reversed the action of a District Judge in refusing an injunction in a somewhat similar case. Speaking for the court in that case, Chief Judge Joseph C. Hutcheson said:

> "We think it clear that, upon the plainest principles governing cases of this kind, the decision appealed from was wrong in refusing to declare the constitutional rights of plaintiffs to have the school board, acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration to abolish segregation in Mansfield's only high school and to put into effect desegregation there.
>
> "Had the court made such a declaration and retained the cause for further orders necessary to implement it, deferment to a later time of action on the prayer for injunctive relief, if necessary, may well have been within his discretion. The issuance of such a declaration of rights with retention of the case would have given the court the means of effectually dispelling the misapprehension of the school authorities as to the nature of their new and profound obligations and compelling their prompt performance of them."

DARK PAGE BLE

The decrees here are not harsh or unreasonable but merely require that the law be observed and discrimination on the ground of race be eliminated. The Arlington decree expressly states that local rules as to assignment to classes, so long as such rules are not based on race or color, are to be observed, and that administrative remedies for admission to schools must be exhausted before application is made to the court for relief on the ground that its injunction is being violated. While the Charlottesville decree does not contain this express provision, the provision is so eminently reasonable that we may safely assume that enforcement of that decree will not proceed upon different principles. As much was indicated by the Judge in his remarks denying the motion to dismiss.

Affirmed.

ED THRU

FILED
MAR 9 1957
JOHN T. FEY, Clerk

In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM 1956

No. 764

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, ET AL.,
Petitioners,

v.

CLARISSA S. THOMPSON, ET AL.,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

EDWIN C. BROWN
OLIVER W. HILL
ROBERT L. CARTER
THURGOOD MARSHALL
SPOTTSWOOD W. ROBINSON, III
623 North Third Street
Richmond 19, Virginia
Attorneys for Respondents

In The
SUPREME COURT of the UNITED STATES

OCTOBER TERM 1956

No. 764

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, ET AL.,
Petitioners,

v.

CLARISSA S. THOMPSON, ET AL.,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

The petition for writ of certiorari herein does not show any special or important reason for granting the writ or any matter or ground justifying review of this case by this Court.

DARK PAGE BLEED THRU

QUESTIONS PRESENTED

Petitioners' contentions present for consideration the following questions:

1. Were the petitioners suable in the District Court?

2. Were there administrative remedies provided by §22-57 of the Code of Virginia that respondents failed to exhaust?

3. Were respondents entitled to injunctive relief without showing individual applications for admission to particular schools?

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The Contention That Petitioners Were Not Suable In The District Court Does Not Present A Substantial Federal Question Undecided By This Court.

The injunction complained of restrains a corporate school board and a division superintendent of schools from segregating pupils on a racial basis in the public facilities they administer. The invalidity of the proscribed activities has been established by this Court, *Brown* v. *Board of Education*, 347 U. S. 483 (1954), 349 U. S. 294 (1955), and judicial authority to curb such conduct is completely vindicated by the many cases holding that actions to enjoin state officers or agencies from activities under color of official

DARK PAGE BL

authority that violate constitutional rights are not prohibited by the Eleventh Amendment. See *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U. S. 299 (1952); *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292 (1937); *Sterling* v. *Constantin*, 287 U. S. 378 (1932); *Public Service Co.* v. *Corboy*, 250 U. S. 153 (1919); *Looney* v. *Crane Co.*, 245 U. S. 178 (1917); *Caldwell* v. *Sioux Falls Stock Yard Co.*, 242 U. S. 559 (1917); *Tanner* v. *Little*, 240 U. S. 369 (1916); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Philadelphia Co.* v. *Stimson*, 223 U. S. 607 (1912); *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636 (1911); *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165 (1910); *Ex parte Young*, 209 U. S. 123 (1908); *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20 (1907); *Prout* v. *Starr*, 188 U. S. 537 (1903); *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (1891); *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824).

The contention that this doctrine is inoperative to corporate state agencies does not present a substantial Federal question. This issue may have been put to rest by the statutory provision that petitioner school board may "sue and be sued." Va. Code, 1950, §22-63. Cf. *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362 (1894); *Interstate Construction Co.* v. *University of Idaho*, 199 F. 509 (D. Idaho 1912). In any event, a corporation, no less than an individual, ceases to legitimately represent the state when its action collides with the Constitution, and loses all basis for asserting a continuing immunity from suit. Cf. *Ex parte Young*, *supra*, 209 U. S. at 159, 160. Indeed, the power to enjoin Virginia's incorporated school boards from unconstitutional activities has frequently been exercised without

suggestion that an Eleventh Amendment problem was involved. See *Davis* v. *County School Board (Brown* v. *Board of Education)*, 347 U. S. 483 (1954), 349 U. S. 294 (1955); *Alston* v. *School Board*, 112 F. 2d 992 (C. A. 4th 1940), *cert. denied* 311 U. S. 693 (1940); *Carter* v. *School Board*, 182 F. 2d 531 (C. A. 4th 1950); *Corbin* v. *County School Board*, 177 F. 2d 924 (C. A. 4th 1949); *County School Board* v. *Freeman*, 171 F. 2d 702 (C. A. 4th); *Smith* v. *School Board*, 82 F. Supp. 167 (E. D. Va. 1948).

2. *The Contention That There Were Arministrative Remedies That Respondents Failed To Exhaust Does Not Present A Substantial Federal Question.*

The argument that respondents did not exhaust their administrative remedies was rejected by a Court that has scrupulously imposed this requirement in situations deemed proper. *Carson* v. *Board of Education*, 227 F. 2d 789 (C. A. 4th 1955); *Hood* v. *Board of Trustees*, 232 F. 2d 626 (C. A. 4th 1956); *Carson* v. *Warlick*, F. 2d (C. A. 4th November 14, 1956). But the only remedy to which petitioners refer is that provided by §22-37 of the Code of Virginia of 1950. Assuming its applicability, the question whether the proceedings there provided bring this case within the exhaustion rule is neither novel nor substantial. Prior to suit, respondents submitted to petitioners a written petition setting forth their grievance and vainly requesting corrective action. Obviously, that satisfied the statutory requirement unless the appeal thereby specified is administrative in character, and the questions whether the appeal is judicial in nature, or whether, if judicial, respondents should nevertheless have pursued it, are apparently foreclosed by previous decisions of this Court. See *Lane* v. *Wilson*, 307

DARK PAGE BLE

U. S. 268 (1939); *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U. S. 196 (1924); *Railroad & Warehouse Commission* v. *Duluth Street Ry. Co.*, 273 U. S. 625 (1914); *Bacon* v. *Rutland R. Co.*, 232 U. S. 134 (1914).

3. The Question Whether Respondents Should Have Made Individual Applications For Admission To Particular Schools Is Unsubstantial.

The Court of Appeals held that the announced policy of the petitioning school officials rendered futile any application by a Negro child to a school other than a segregated Negro school and that "equity does not require the doing of a vain thing as a condition of relief." In so doing the Court adhered to well settled doctrine that futile remedies need not be undertaken. *See City Farmers Trust Co.* v. *Schnader*, 291 U. S. 24 (1934); *Montana National Bank* v. *Yellowstone County*, 276 U. S. 499 (1928); *Waite* v. *Macy*, 246 U. S. 606 (1918); *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145 (C. A. 5th 1936), *cert. denied* 298 U. S. 668 (1936); *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 337 (E. D. La. 1956). The contention that the Court of Appeals was wrong in this connection is therefore without substance.

Furthermore, it is not respondents' prerogative to define or prescribe the criteria to be employed to determine the particular schools that particular pupils are to attend. This is and remains to be the function of school authorities so long as the limits set by the Constitution are observed. But until those criteria are formulated and applied, no student can know what school he is to attend. The right respondents assert in this case is the right to be educated in public schools determined by criteria other than race. They assert simply their constitutional privilege to freedom from racial

classifications and distinctions in assignments to school and classes. Once race is eliminated as a factor determinative of the school a pupil is to attend, the constitutional issue is resolved, and determination of the particular school he might in fact attend would result from the operation of educationally significant factors within the competency of the school authorities to prescribe and apply.

CONCLUSION

For the reasons hereinbefore stated, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

EDWIN C. BROWN
OLIVER W. HILL
ROBERT L. CARTER
THURGOOD MARSHALL
SPOTSWOOD W. ROBINSON, III
623 North Third Street
Richmond 19, Virginia

Attorneys for Respondents

DARK PAGE BLEED THRU